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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 480.

J. FIELDS, *Petitioner*,

v.

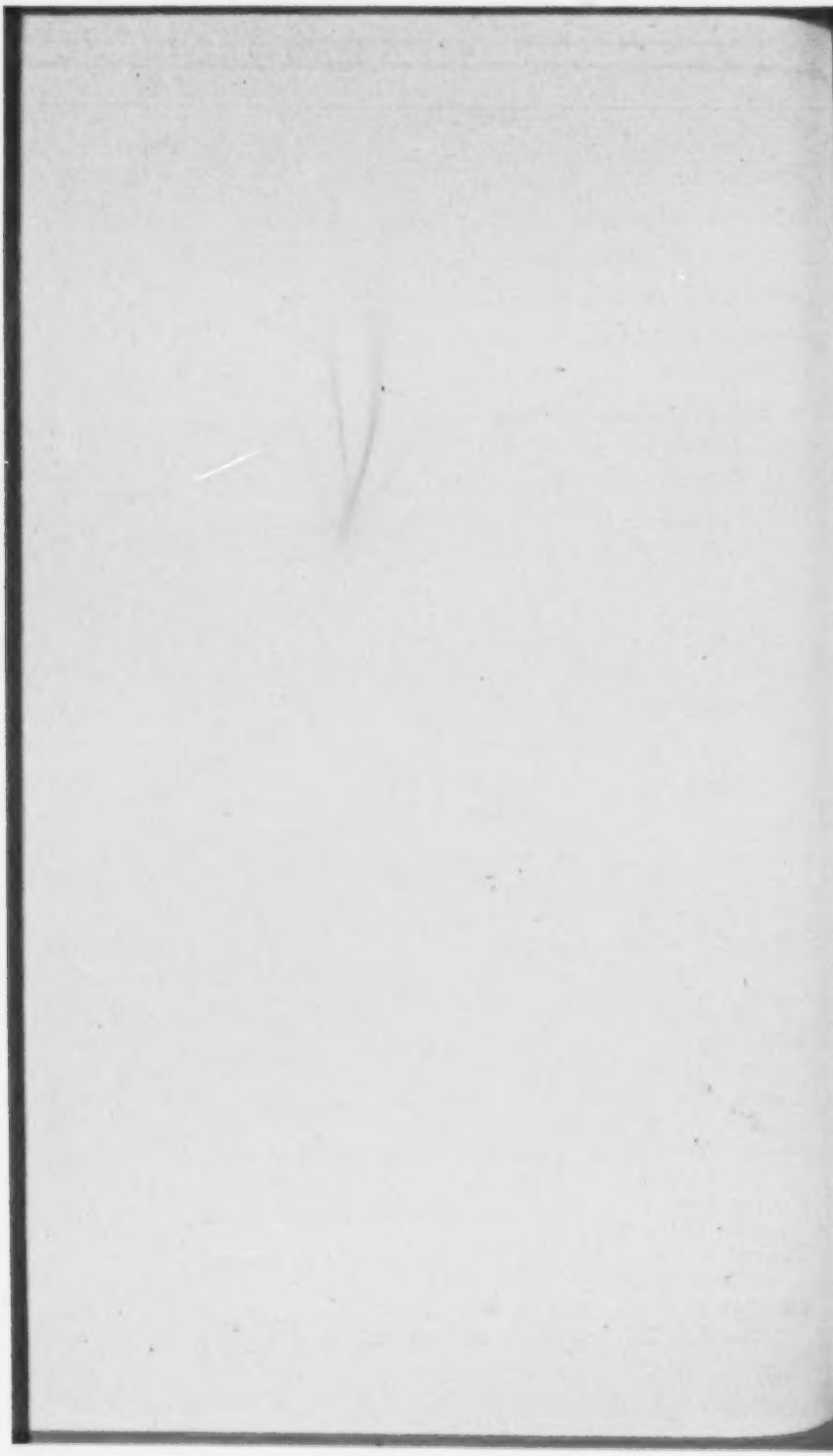
R. W. FERGUSON AND GOLDIA FERGUSON, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas

BRIEF OF RESPONDENTS IN OPPOSITION

AARON L. FORD
1022 Munsey Building
Washington, D. C.
Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

JURISDICTION

Respondents assert that no good reason exists for the issuance of the Writ of Certiorari and believe that *certiorari* should be denied because (1) A federal question was not properly or timely raised; (2) The claim that respondents raised a new issue in the Supreme Court of Arkansas on a petition for rehearing or that that Court decided the case on a new issue raised for the first time before it and thereby denied petitioner his constitutional right of notice and hearing thereon is so frivolous and lacking in merit as to present no substantial federal question; and (3) The decision of the Supreme Court of the State of Arkansas is

sustained on non-federal grounds in that under the local law of the State the deed under which petitioner lays claim to title to the property involved is void.

REFERENCE TO OPINION OF COURT BELOW

The judgment complained of was rendered by the Supreme Court of the State of Arkansas in the case of *Ferguson et al.* v. *Fields et al.*, No. 7559. The controlling and dissenting opinions of the Court are reported in .... Ark. .... 188 S. W. 2d 302, 304.

SUPPLEMENTAL STATEMENT OF THE CASE

We deem it necessary to correct certain inaccuracies and omissions in Petitioner's statement of the case in order that it contain all that is material to the consideration of the question presented. We believe it will be less confusing to state all the material facts rather than to call attention to inaccuracies and omissions in Petitioner's statement.

R. W. Ferguson and his wife, Goldia Ferguson, respondents here, are the owners of lot 9, Block 124, Fitzgerald addition to the City of Fort Smith, Arkansas. They acquired it by purchase in 1932 and with the exception of about two years between 1939 and 1942 they have resided on said property. (R. 12-13) This lot is embraced within the boundaries of the Sebastian Bridge District. Respondents failed to pay the bridge district's benefit assessments against said property for the years 1935, 1936 and 1937 amounting to $24.98. The district brought a foreclosure suit under applicable statutes on June 22, 1938, and a decree of foreclosure was rendered by the Sebastian Chancery Court, Fort Smith District, on June 17, 1939. (R. 48-53) Sale was had under said decree, and along with other property the lot involved in this litigation was struck off to the Sebastian Bridge District on September 13, 1939. Under the law, declared by the Supreme Court of the State of Arkansas on July 7, 1941, in the case of *Hopkins* v. *Fields*, 202 Ark. 890, 154 S. W. 2d 22, respondents had two years from the date of the sale,

September 13, 1939, in which to redeem their property from said sale.

On July 31, 1940, well within the two-year redemption period, and at a time when he had no right, title or interest whatever in said lot, petitioner paid to the Sebastian Bridge District, the taxes due the district, on said lot, for the years 1935-36 and 37 and received receipt therefor. (R. 24, 26)

On September 17, 1940, the Sebastian Bridge District executed its quitclaim deed conveying whatever interest it had in said lot to petitioner for $24.98, plus 20%, the amount of delinquent assessments, penalty and costs accrued against said lot. Petitioner moved the Chancery Court for a confirmation of said sale on October 23, 1940, and an order confirming said sale and directing the commissioner to execute and deliver petitioner his deed was entered on November 5, 1940. The Commissioner's deed conveying said lot to petitioner was duly executed on December 6, 1940, and said deed was recorded on December 16, 1941. (R. 47)

On February 11, 1942, respondents filed the instant suit in the Sebastian Chancery Court, Fort Smith District, against petitioner, alleging they were not served with summons and had no notice of the foreclosure suit by the Sebastian Bridge District; that before the expiration of the two-year period for redemption allowed by law in such cases, the Sebastian Bridge District conveyed its interest in the lot involved, by quitclaim deed, to petitioner, for the sum of $24.98, the amount of taxes against said lot; and that petitioner was asserting ownership in said lot and was attempting to interfere with their ownership and possession. Respondents also alleged that because they were not summoned and had no notice of the foreclosure suit by the Sebastian Bridge District the decree rendered against them therein was void; that they had tendered to petitioner the amount paid by him to the Sebastian Bridge District, plus twenty per cent, with a request that he reconvey their lot to them; that petitioner declined to accept said tender or reconvey said property; and that they had tendered and paid said sum into court. They prayed that all the proceedings had under the foreclosure suit by the Sebastian Bridge District be declared void as to them and that the deed from said district to petitioner

conveying their lot be cancelled and held for naught and that title to said lot be quieted and confirmed in them. Respondents also prayed for all equitable relief. (R. 2-3) An amendment to the complaint was filed April 16, 1942, making the Sebastian Bridge District a party defendant. (R. 5-7)

Petitioner moved to dismiss respondent's complaint. (R. 4-5) The Sebastian Bridge District demurred. (R. 8) After the motion and demurrer were overruled, petitioner and the Sebastian Bridge District answered alleging proper service in the foreclosure proceedings and that the instant suit was a collateral attack on a valid and subsisting judgment and that the court was without jurisdiction. (R. 7-9)

The cause was tried before the Chancellor on May 23, 1944. (R. 12) During the course of the trial and presentation of the evidence to the Chancellor Mrs. Mabel Patton, secretary for the Sebastian Bridge District, was called as a witness by and testified on behalf of petitioner. (R. 22) She testified that the records of her office reflected that petitioner, on July 31, 1940, paid to the Sebastian Bridge District the sum of $28.60 as taxes on the lot involved for the years 1935, '36 and '37 and that the district issued him its receipt therefor, the same being number 8500. (R. 22-26) The tax collector's copy of the receipt was offered in evidence by counsel for petitioner and was made a part of the record by stipulation. (R. 26)

At the close of the presentation of the evidence in the trial court a decree was rendered which found that the two-year period of redemption had expired; that respondents were duly served with summons in the foreclosure suit of the Sebastian Bridge District; and that the decree of foreclosure in said suit was valid and binding against respondents. The original and amended complaint was dismissed for want of equity. (R. 30-32) Respondents prayed an appeal to the Supreme Court of Arkansas and same was granted. (R. 32)

On March 12, 1945, the Supreme Court of Arkansas affirmed the decree of the chancery court. Petition for rehearing was duly filed by respondents (R. 65-67) and on May 21, 1945, the Supreme Court of Arkansas vacated and set aside the decree which it had entered on

March 12, 1945; held that the payment of the taxes by petitioner to the Sebastian Bridge District on July 31, 1940, amounted to a redemption of the property which inured to the benefit of respondents; reversed the decree of the chancery court and remanded the cause with directions to cancel petitioner's deed and quiet title to the lot in question in respondents. (R. 57-61)

Petitioner filed his petition for rehearing in the Supreme Court of Arkansas alleging that the court had erred in (1) allowing the question of a voluntary tax payment and redemption to be raised for the first time on rehearing; (2) Holding that petitioner was a volunteer, and that his payment of the amount necessary to purchase the lot from the district amounted to a redemption for respondents, and extinguished the district's lien on the property, and that the district was without authority to convey the lot to him; and (3) The decision of the court complained of is violative of petitioner's constitutional rights. (R. 61-63) Respondents filed a response to said petition. (R. 64-65). This petition was denied by the Supreme Court of Arkansas, without opinion, on July 2, 1945. (R. 65) The case is now before this Court on petitioner's application for a writ of certiorari to review the decisions of the Supreme Court of Arkansas which were entered by it on May 21 and July 2, 1945.

QUESTIONS PRESENTED RESTATED

We believe the jurisdictional questions presented, as set forth by petitioner (Pp. 4) may be more accurately stated as follows:

1. Did the Supreme Court of the State of Arkansas, in its decision and judgment entered on May 21, 1945, by holding that, from petitioner's own evidence, introduced by him in the Chancery Court and at all times a part of the record before the Supreme Court, the Petitioner had redeemed the property in question from the tax or benefit assessment foreclosure sale within the time allowed by law for redemption; and that said redemption inured to the benefit of respondents; and that the deed from the Sebastian Bridge District to petitioner was void, deny peti-

tioner his constitutional right to notice and an opportunity to be heard thereon and thereby deprive him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States although these points were stressed and argued by counsel for the first time before that Court on respondents' petition for rehearing?

2. Was the due process question properly or timely raised?

3. Did the Judgment of the lower court entered on May 21, 1945, rest entirely on local law?

4. Did the judgment of the lower court denying petitioner's application for rehearing rest on adequate and independent state grounds?

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents' argument will first discuss three reasons why *certiorari* should not be granted, and will then consider the sufficiency of the grounds asserted by petitioner. The reasons why *certiorari* should not be granted are:

I. A Federal Question Was Never Properly or Timely Raised

(a) The petitioner did not assert the constitutional question which he is now attempting to raise until the filing of his motion for rehearing.

(b) The Court, in denying the motion for rehearing, did not base its decision solely on a federal or constitutional question.

II. No Substantial Federal Question is Involved

(a) The petitioner has not been improperly deprived of any rights.

(b) Petitioner has had a fair hearing in a court which had jurisdiction of the parties and subject matter.

(c) No sound basis exists for the claim that the Supreme Court of the State of Arkansas in allowing respondents for the first time to stress and argue evidence which was introduced by petitioner and was a part of the record, as well as the law applicable thereto, denied petitioner his constitutional right to notice and an opportunity to be heard thereon and thereby deprived him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

III. The Decisions of the State Court Are Sustained on Non-Federal Grounds

(a) The determination of the questions as to whether the payment of the 1935, '36 and '37 delinquent taxes or bridge district benefit assessments by petitioner to the Sebastian Bridge District on July 31, 1940, well within the two-year redemption period, amounted to a redemption of the property from foreclosure sale; that such redemption inured to the benefit of respondents since petitioner was a mere volunteer, had no interest of any kind in the property, and acquired none by paying these taxes; and that the deed thereafter from the Sebastian Bridge District to petitioner was void, since all taxes due the District had been paid, are questions of local law and present no federal ground for review by the Supreme Court of the United States.

(b) The action of the court below in entering an order denying petitioner's petition for rehearing is clearly sustained on non-federal grounds.

ARGUMENT

I.

FEDERAL QUESTION WAS NEVER PROPERLY OR TIMELY RAISED

The record does not show that a federal question was properly or timely raised and preserved. It was not raised, if raised at all, until petitioner filed his Petition for rehearing.

Petitioner was given ample notice when respondents filed their petition for rehearing, and their brief in support of same (pp. 2-3) that they would stress and argue the very points that petitioner now claims he had no notice of or opportunity to be heard on. When he received this notice, it became his duty then, if he desired to properly or timely raise such a question, to inform the court that if it agreed with respondents' contentions and argument on their petition for rehearing he would be denied his right to notice and an opportunity to be heard thereon and would thereby be deprived of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. He did not present the question at the first opportunity but awaited the final decision of the Court evidently in anticipation it would be favorable to him. When petitioner finally raised the question on his petition for rehearing the Supreme Court denied the application without giving any reasons.

From the foregoing it appears that a federal question was never properly or timely raised by petitioner. In any event, it was not raised until in the petition for rehearing, which was too late. *Bank* v. *Durr*, 257 U. S. 99, 106, 66 L. ed. 149, 152; *Herndon* v. *Georgia*, 295 U. S. 441, 79 L. ed. 1530.

Petitioner has failed to sustain the burden of showing that this court has jurisdiction. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651, 86 L. ed. 1090, 1094.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Even if it be assumed for the purpose of an argument that a federal question was properly raised by petitioner, it was not substantial in character. The assertion of petitioner that this case was originally submitted to the Supreme Court of the State of Arkansas solely on the question of service in the foreclosure suit and that the volunteer

and redemption issue was raised for the first time in that court is lacking in merit. Petitioner raised these questions in the Chancery Court by his own witness when he placed Mrs. Mable Patton on the witness stand and she testified at his request concerning his payment of the delinquent taxes on July 31, 1940, on the property involved in the instant suit, for the years 1935, 36 and 37. (R. 22-26) To clearly see that these questions were before the Supreme Court of Arkansas when the case was first presented to that court one need only look to the dissenting opinion filed in *Ferguson* v. *Fields*, —— Ark. ——, 188 S. W. 2d 302, 304, 306, wherein the courts vacated opinion of March 12, 1945, was quoted in full. The dissenting opinion quoting from the vacated opinion, at page 306, recites:

> "Mrs. Mable Patton testified on behalf of appellees that she was collector of Sebastian Bridge District; that she sent a card to appellants notifying them of the delinquent tax on said property; that the taxes for 1935, 1936 and 1937 were not paid before the foreclosure suit and the receipt for such payments were issued by her to appellee J. Fields on July 31, 1940." (R. 67, 71)

The controlling opinion in *Ferguson* v. *Fields*, *Supra* had the following to say on these questions:

> "Appellee argues that appellants cannot raise, for the first time here, the above question, which they say was not raised on the trial below. While it does appear that the point, that no taxes were due when the deed to Fields was executed, was not stressed, it was raised in appellants' brief and was a part of the record proof. Appellants' complaint would, and must be, considered as amended to conform to the proof.
>
> "On the question of the payment of the taxes by J. Fields to the District, appellee brought out in the testimony from Mrs. Mabel Patton, Secretary of the Bridge District, the following testimony: "Mrs. Patton: This (Receipt No. 8500) was paid July 31, 1940 by J. Fields, Little Rock Arkansas, $28.60.' "Mr. Bland: We offer the receipt in evidence. That is

Receipt No. 8500? "Mrs. Patton: Yes sir.' "Mr. Bland: We offer this in evidence. "Q. What year was that receipt for? A. 1935, '36 and '37."

* * * "Appellants, as indicated, though not arguing and stressing the point, clearly raised this issue in their brief in the following language: 'The delinquent taxes were due for the last three years, '35, '36 and '37, and this receipt No. 8500 was issued after 1937, and it was for the '35, '36 and '37 taxes, and 1937 was the last year the taxes were paid in the district. The sale was had in September, 1939. The taxes were paid through the foreclosure procedure and tax receipt No. 8500 would show who paid the taxes and when the taxes were paid. A copy of the tax receipt was introduced showing that the tax was paid July 31, 1940, by J. Fields, of Little Rock, Arkansas, $28.60, R. pp. 35-40.' (R. 58, 60)"

On page 26 of the transcript of record before this Court we find the following at the conclusion of the testimony of Mrs. Mabel Patton:

"Reporter's Note: * * * The district wishing to retain the receipt in its files, it was agreed by and between counsel, that the same reflects the information just testified to by Mrs. Patton. * * *"

Obviously, and especially in view of the fact that petitioner introduced the evidence in the trial court raising the points upon which the case was ultimately decided, and upon which he now complains of, petitioner's claim of a denial of his constitutional right to notice and an opportunity to be heard thereon is so frivolous and lacking in merit as to present no substantial federal question and the petition should therefore be denied. *Zuch* v. *King*, 260 U. S. 174, 177, 67 L. ed. 194, 198.

III.

THE DECISIONS OF THE STATE COURT ARE SUSTAINED ON NON-FEDERAL GROUNDS

The judgment of the court below, entered on May 21, 1945, dealt with local and general law within the State of Arkansas. No federal question whatever was before the state court. The court's judgment was amply sustained by the evidence and record before it and its holding that petitioner was a volunteer when he paid the taxes on the property in question; that said payment inured to the benefit of respondents; that since the payment of the delinquent taxes was made within the time allowed by law for the redemption of property from tax delinquent foreclosure sales, no taxes were due and no lien existed in favor of the Sebastian Bridge District when it executed a quit claim deed to petitioner covering the property involved; that the district was without authority to convey the lot to him and that said deed is void is wholly a question of local law.

Furthermore, when petitioner filed his petition for rehearing before the Supreme Court of the State of Arkansas and asserted for the first time that he had been denied his constitutional right he also urged adequate and independent state grounds of error on the part of the court. (R. 61) The order of the Supreme Court of Arkansas, entered on July 2, 1945, denying petitioner's petition for rehearing, without opinion, (R. 65) is sustained on the denial of the state grounds urged by petitioner.

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *Memphis*, 20 Wall (US) 590, 636, 22 L. ed. 429, 444; *Berea College* v. *Kentucky*, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 S. Ct. 318; *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 L. ed. 158, 56 S. Ct. 183. The reason for this principle is obvious. It is found in the partitioning of power

between the state and Federal judicial systems and in the limitations of this Court's own jurisdiction.

The rule is also well settled that where it is not clear whether the judgment rests on a Federal ground or an adequate state one, as in petitioner's case on his application for rehearing and the judgment entered thereon, this Court will not review. *Klinger* v. *Missouri*, 13 Wall (U.S.) 257, 263, 20 L. ed. 635, 637; *DeSaussure* v. *Gaillard*, 127 U.S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson* v. *Risk*, 137 U.S. 300, 307, 34 L. ed. 683, 686; 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 U.S. 293, 35 L. ed. 193, 11 S. Ct. 528; *Adams* v. *Russell*, 229 U.S. 353, 358-361, 57 L. ed. 1224, 1226-1228, 33 S. Ct. 846; *Lynch* v. *New York*, 293 U.S. 52, 79 L. ed. 191, 55 S. Ct. 16. The following recent statement of Mr. Chief Justice Stone in the case of *Flournoy* v. *Wiener*, 321 U.S. 253, 262, 88 L. ed. 708, 714, appears quite applicable to this case:

> "Hence, the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made on a federal question otherwise reviewable here."

IV.

THE PETITION AND BRIEF OF PETITIONER DOES NOT DISCLOSE ADEQUATE REASONS FOR GRANTING CERTIORARI

We believe we have shown under the previous headings that *Certiorari* should be denied. Since we have already pointed out that the federal question was not properly or timely raised we will now comment on the sufficiency of the other ground asserted in the petition and brief of petitioner.

Was Petitioner Denied His Constitutional Right of Due Process.

Assuming, for the purpose of argument, that the federal question was properly and timely raised, was the action of the Supreme Court of Arkansas in vacating its judgment of March 12, 1945, and entering its judgment of May 21, 1945, for the reasons therein indicated, contrary to all its previous decisions, and was petitioner denied his constitutional right of Due Process?

In considering this question in its two phases we must keep in mind the testimony of Mrs. Mabel Patton (R. 22-26) and the fact she was petitioner's witness in the trial court. (R. 22) We are not going outside the record for a statement of fact, as petitioner did, but rest our case solely on the record. We think the record clearly demonstrates that the testimony of Mrs. Mabel Patton and the information contained in receipt No. 8500 was before the Chancellor when he made his decision and that such testimony and information was also before and considered by the Supreme Court of Arkansas when it rendered its opinion on March 12, 1945, and when it entered its judgment on May 21, 1945. This being true it became the duty of the Chancellor to correctly apply the law to the facts before him, and having failed to do so in the instant case, it became the duty of the Supreme Court to correct his error. Chancery cases on appeal to the Supreme Court of the State of Arkansas are tried *de novo* upon the record which was before the Chancellor. *Bayou Meto Drainage District* v. *Chapline,* 143 Ark. 446, 220 S. W. 807; *Fletcher* v. *Simpson,* 144 Ark. 463, 222 S. W. 710; *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; *Newsom* v. *Reed,* 177 Ark. 177, 6 S. W. 2d 10, and where error appears from the face of the record the decree of the lower court will be reversed. *Central Bank of Little Rock* v. *Downtain,* 125 Ark. 305, 257 S. W. 802.

When petitioner introduced Mrs. Mabel Patton as a witness the facts which she revealed were before the court for

all purposes. The surprise element which petitioner urges could not possibly arise from the facts revealed by petitioner's own witness. Nor can petitioner be sustained in his contention that the issues thus raised and subsequently decided by such testimony were not a part of the pleadings.

In the case of *Gallegly* v. *American Ins. Union*, 180 Ark. 4, 11, 20 S. W. 2d 642, 644 the court said:

> "The issue relative to the illegal demand and of the payment of such chapter dues, while not raised by the pleadings originally filed, was raised by the evidence introduced, to which no exception was made, and therefore the complaint will be treated as amended to conform to the proof."

And again in the case of *Jonesboro Coca-Cola Bottling Co.* v. *Holt*, 194 Ark. 992, 997, 110 S. W. 2d 535, 537 the court said:

> "* * * It is the settled rule of this Court that, in cases where evidence is admitted, the complaint will be considered amended to conform to the proof. If there is objection made to the evidence, the trial judge may admit the evidence, and if necessary, give the adverse party an opportunity to prepare to meet it."

Having shown that the judgment of the Supreme Court of Arkansas entered on May 21, 1945, for the reasons therein indicated, was not contrary to its previous decisions, we now come to the last phase of the question.

Assuming once more, for the sake of argument, that by entering its judgment on May 21, 1945, for the reasons therein given, the Supreme Court of Arkansas rendered a decision contrary to all its previous decisions on a question, did such action constitute a denial of due process to petitioner?

Having introduced the witness and placed the evidence before the court for some purpose we are unable to understand where petitioner was denied his constitutional right to notice and an opportunity to be heard thereon, or that he should now be given an opportunity to introduce addi-

tional evidence to explain or minimize the importance of the evidence which he has already introduced.

The mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim of lack of due process under the Fourteenth Amendment or otherwise confer jurisdiction on this court. *Central Land Co.* v. *Laidley*, 159 U.S. 103, 112, 40 L. ed. 91, 94, 16 S. Ct. 80; *Patterson* v. *Colorado*, 205 U.S. 454, 461, 51 L. ed. 879, 880, 27 S. Ct. 556; *Willoughby* v. *Chicago*, 235 U.S. 45, 50, 59 L. ed. 123, 126, 35 S. Ct. 23; *O'Neil* v. *Northern Colorado Irrig. Co.*, 242 U.S. 20, 26, 27, 61 L. ed. 123, 128, 129, 37 S. Ct. 7; *Dunbar* v. *New York*, 251 U.S. 516, 519, 64 L. ed. 384, 385, 40 S. Ct. 250; *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 118, 67 L. ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450, 455, 68 L. ed. 382, 385, 388, 44 S. Ct. 197; *American R. Exp. Co.* v. *Kentucky*, 273 U.S. 269, 273, 71 L. ed. 639, 641, 47 S. Ct. 353.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition sets forth no substantial ground for the granting of *certiorari*, and that the petition should be denied.

Aaron L. Ford
1022 Munsey Building
Washington, D. C.
Counsel for Respondents